In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1551

NELSON E. WEBER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In August, 1964, petitioner entered a plea of guilty to a three-count indictment charging that he willfully attempted to evade his income tax for the years 1958 through 1960 by filing false and fraudulent income tax returns, in violation of Section 7201 of the Internal Revenue Code of 1954 (App. 1).[1] The court imposed a fine of $5,000 on each count, suspended any sentence of imprisonment, and placed petitioner on probation for three years (App. 1–2). In addition to the usual conditions, petitioner's probation required that he make settlement with the Internal Revenue Service for taxes, penalties and interest owed for the years

[1] "App." refers to the Appellant's Appendix in the court of appeals.

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1958 through 1960, although petitioner retained "the full right without any prejudice * * * to fully and completely and without restriction contest any tax and defend against any taxes that may be improperly taxed against him" (App. 3–4). Petitioner accepted the terms of his probation without objection.

The Service assessed petitioner some $176,000 for the period in question, to which petitioner countered with a $10,000 offer in compromise. Shortly prior to expiration of the three years' probation no action had been taken on this offer, and accordingly the probation officer requested a two-year extension of the probation to provide petitioner additional time in which to negotiate a settlement (App. 5). The court granted the extension (App. 6).

A brief time before the extended expiration date, the probation officer filed a probation revocation petition, alleging that petitioner had violated the terms of his probation. As grounds for this allegation, the petition charged, *inter alia,* that petitioner made an offer in compromise accompanied by an incorrect Statement of Financial Condition, and that he failed to cooperate with Internal Revenue Agents in their attempts to ascertain whether he had secreted assets (App. 6–8). Following a three-day hearing, the district judge found that petitioner had "violated the terms and conditions of his probation order" (App. 13) and hence revoked his probation. Petitioner was sentenced to 18-month concurrent prison terms on each of the three counts (*id.*). The court of appeals affirmed (Pet. App. A).

In this Court petitioner reargues the same issues presented to and rejected by the court below. His contentions principally concern the district judge's refusal to adhere rigidly to the requirements of the Federal Rules of Criminal Procedure in handling the probation revocation proceeding. A probation revocation hearing is, however, not governed by the same detailed procedures as a criminal trial. Instead, it is a summary proceeding, in which the trial judge has broad discretion and as to which the Rules of Criminal Procedure are not strictly applicable. See *Burns* v. *United States,* 287 U.S. 216, 221. See also C. Wright, *Federal Practice and Procedure* Sec. 530, pp. 440, 442.

Thus the courts below properly ruled that a revocation hearing is not a "trial" within the reach of Rule 23, so that, contrary to petitioner's assertion (Pet. 16–18), special findings of fact are not required on request. Cf. *United States* v. *Koury,* 319 F. 2d 75, 77 (C.A. 6); see also Pet. App. A, pp. A5–A6. Nor was the proof as to petitioner's defaults insufficient, as he says (Pet. 6–10, 20–21). On this score, petitioner argues that government evidence indicating that petitioner possessed but failed to report substantial assets (certain government notes) was inadmissible under the Rules, and that without such evidence the government did not meet the burden of proving his guilt. Again, formal compliance with the strict rules of evidence was not required. The record clearly establishes that petitioner sought to settle an uncontested tax liability exceeding $175,000 for $10,000, be-

cause of his alleged "inability to pay", and submitted in support of this claim a false Statement of Financial Condition. The Statement omitted a bank account and substantial surrender values of life insurance policies owned by petitioner. It also omitted government notes, which petitioner conceded he had purchased through various business enterprises.[2] The evidence of which petitioner complains indicated that the notes were still outstanding at the time the Statement was filed and later when the probation revocation hearing was held (App. 30, 46). Petitioner declined to explain the obvious implications raised by these facts (App. 42, 52). In the circumstances, the government's proof did not unfairly burden petitioner and plainly shows that indeed he did violate his probation, as the court of appeals held (Pet. App. A, pp. A6–A7).

The court of appeals also correctly rejected petitioner's argument (see Pet. 22–24) that it was improper to condition his probation on settlement of his tax liabilities. See Pet. App. A, pp. A3–A5. Since petitioner took no appeal from the probation order,

[2] Petitioner purchased a total of $65,000 worth of government notes, some in the name of his sole proprietorship (Capitol Aircraft) and others in the name of National Insurance Underwriters, for which he had been a branch manager (App. 22–28, 33–38, 45–46). National had no record of ever having received the bonds petitioner allegedly purchased for it (App. 26). In 1968, petitioner exchanged $15,000 in matured bonds which he had purchased in 1960 in the name of Capitol and National, for $15,000 in new bonds maturing in 1975, and protested when the bank handling the exchange recorded it in Capitol's bank account (App. 21–23, 33).

he cannot now attack the terms of probation. See *United States* v. *Steiner*, 239 F. 2d 660, 661–662 (C.A. 7). Moreover, this condition is a proper one under the restitution clause of 18 U.S.C. 3651. *United States* v. *Stoehr*, 196 F. 2d 276, 284 (C.A. 3), certiorari denied, 344 U.S. 826.

Petitioner's final argument (Pet. 18–19) is that the court of appeals affirmed the trial judge's actions on a theory different from the theory applied by the trial judge. Petitioner urges that the trial judge relied almost exclusively on the government's showing as to petitioner's omission of the government notes from the financial statement, while the court of appeals rested its decision instead on the evidence concerning the other items omitted. This is an unwarranted view of the matter. Both the trial judge and the court of appeals considered *all* omissions, and found a probation violation on that basis (see, *e.g.*, Pet. App. A, pp. A6–A7). There was no change in theory by the appellate court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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